ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-39

August 30, 2022

JUSTICE AND SOLICITOR GENERAL

Case File Number 005624

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Justice and Solicitor General (the Public Body) for pager, cellphone and internal Government of Alberta messenger communications relayed by three specific employees and all email correspondence from the email "inbox" of one of the employees about the Applicant for the time period of 2013 to the date of the request (July 28, 2015).

The Public Body responded to the access request, providing emails involving all three Crown prosecutors. It did not locate or provide pager, cellphone, or internal Government of Alberta messenger communications. The Public Body severed some information under sections 17 (disclosure harmful to personal privacy), 18 (disclosure harmful to individual or public safety), 24 (advice from officials), and section 27 (privileged information).

The Applicant requested review of the adequacy of the Public Body's search for responsive records and its severing decisions. In particular, he questioned the lack of pager, cellphone, or internal Government of Alberta messenger communications.

The Adjudicator confirmed the Public Body's decisions to withhold information under sections 17, 24, and 27 of the FOIP Act. The Adjudicator determined that section 18 of the FOIP Act did not apply and directed the Public Body to disclose the content of a record to which only section 18 had been applied.

The Adjudicator found that the Public Body had met its duty to assist the Applicant by conducting a reasonable search for responsive records and providing an explanation of the search it conducted.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act***,** c. F-25, R.S.A. 2000, ss. 10, 17, 18, 24, 27, 72

Authorities Cited: AB: Orders F2004-29, F2007-029, F2013-51, F2015-29, F2019-35, F2021-08

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23 (CanLII), [2010] 1 SCR 815; (*Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821)

I. BACKGROUND

[para 1] On July 28, 2015 the Applicant made an access request to Justice and Solicitor General (the Public Body) for pager, cellphone and internal Government of Alberta messenger communications about the Applicant relayed by three specific employees and all email correspondence about the Applicant from the email "inbox" of one of the employees for the time period of 2013 to the date of the request (July 28, 2015).

[para 2] The Public Body responded to the access request on March 9, 2017. It conducted a search and located records. The records it located were emails created by, or sent to, the three employees named in the Applicant's access request. The Public Body severed information from the records on the basis of sections 17, 18, 24, and 27.

[para 3] The Applicant requested review by the Commissioner of the Public decisions to sever information from the records.

II. ISSUES

ISSUE A: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to information in the records?

ISSUE B: Did the Public Body properly apply section 18 of the FOIP Act (disclosure harmful to individual or public safety) to information in the records?

ISSUE C: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to information in the records?

ISSUE D: Did the Public Body properly apply section 27(1) of the Act (privileged information) to information in the records?

ISSUE E: Did the Public Body meet its duty under section 10 of the Act (duty to assist applicants)?

III. DISCUSSION OF ISSUES

ISSUE A: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to information in the records?

[para 4] Section 17(1) of the FOIP Act requires a public body to withhold personal information from an applicant if disclosure would be an unreasonable invasion of personal privacy. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *[…]*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of personal privacy if*
>
> > *[…]*
> >
> > *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
> >
> > *[…]*
> >
> > *(d) the personal information relates to employment or educational history,*
> >
> > *[…]*
> >
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party […]*
> >
> > *[…]*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal*

privacy, the head of a public body must consider all the relevant circumstances, including whether

> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
>
> *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
>
> *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
>
> *(e) the third party will be exposed unfairly to financial or other harm,*
>
> *(f) the personal information has been supplied in confidence,*
>
> *(g) the personal information is likely to be inaccurate or unreliable,*
>
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
>
> *(i) the personal information was originally provided by the applicant.*

[para 5] If the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy, a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) sets out the circumstances in which disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 6] When the specific types of personal information set out in section 17(4) are involved, disclosure is subject to a rebuttable presumption that it would be an unreasonable invasion of a third party's personal privacy to disclose the information. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies), and balance these against any presumptions arising under section 17(4). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered. If, on the balance, it would not be an unreasonable invasion of personal privacy to disclose an individual's personal information, a public body may give an individual's personal information to a requestor.

[para 7] The Public Body applied section 17(1) to withhold information about an employee's personal plans and the name of a private citizen that appears in the records.

The information regarding the employee is subject to the presumption set out in section 17(4)(d), and the name of the citizen is subject to the presumption set out in section 17(4)(g).

[para 8] On the evidence before me, I am unable to identify any factors that would serve to rebut the presumption that it would be an unreasonable invasion of personal privacy to disclose to the Applicant the information to which the Public Body applied section 17(1). As a result, I will confirm in the order that the Public Body is required to withhold this information from the Applicant.

Information about the Applicant's clients

[para 9] I note that the Public Body disclosed personally identifying information about the Applicant's clients to the Applicant. I also note that the Applicant made the access request on his own behalf and not those of the individuals described as his clients or former clients in the records. As a result, the information was not provided to the Applicant as their representative.

[para 10] It may be the case that the Public Body weighed factors under section 17(5) and came to the conclusion that the factors weighing in favor of disclosure outweighed the presumption created by 17(4) in relation to the personal information. If so, then the disclosure is appropriate.

[para 11] The issue of the disclosure of the Applicant's former clients' personal information is not before me. However, as it was not clear to me that the Public Body recognized that the Applicant was not representing his former clients when he made his access request, I draw to the Public Body's attention that they are not represented by the Applicant and that the information in the records arises from law enforcement records falling within the terms of section 17(4)(b), which is a factor weighing strongly against disclosure for any records to which it applies. When an agent makes an access request containing information about former clients, it is important for a public body to determine whether section 17(1) authorizes disclosure or requires withholding the information.

ISSUE B: Did the Public Body properly apply section 18 of the FOIP Act (disclosure harmful to individual or public safety) to information in the records?

[para 12] Section 18 of the FOIP Act authorizes a public body to withhold information from an applicant if disclosure could reasonably be expected to result in harm to individuals or public safety. It states, in part:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health, or*

(b) interfere with public safety […]

[…]

[para 13] In Order F2013-51, the Director of Adjudication reviewed past orders of this office regarding the application of section 18 and stated:

> These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information (as must a custodian applying section 11(1)(a) of the HIA).
>
> Following the approach adopted by the former Commissioner in Order 96-004, and in subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.

[para 14] In Order F2004-029, the adjudicator stated that "being difficult, challenging, or troublesome, having intense feelings about injustice, being persistent, and to some extent, using offensive language, do not necessarily bring section 18 into play".

[para 15] More recently, in Order F2021-08, I found that section 18 may apply to disclosure of information likely to undermine a public body's ability to protect employees from harassment. I said:

> The Public Body adopted the strategy in the withheld records on the basis of evidence and consultation with experts. It is clear to me from the evidence of the Public Body and the content of the records that disclosing the withheld information would reduce the effectiveness of this strategy. I therefore find that section 18(1)(b) is engaged by the information in the records, given that disclosure would interfere with the ability of the Public Body to maintain the safety of its employees and those visiting its premises. To put the point differently, disclosing the information would interfere with its ability to maintain public safety.

[para 16] From the foregoing cases, I conclude that if a public body is able to establish that there is a reasonable expectation that harm to an individual's mental or physical health or harm to public safety will result from disclosure of the information, it will have established that section 18 applies to that information. Section 18 may apply to information revealing strategies a public body has developed in order to protect employees from the risk of physical or mental harm if disclosure could reduce the effectiveness of the strategy. However, establishing only that an applicant is persistent or troublesome, or that a strategy has been developed to address persistent or troublesome clients, falls short of establishing that section 18 applies.

[para 17] The Public Body argues:

> The Public Body asserts that the disclosure of the responsive records/information to the Applicant [pages 11, 12, 19 and 117] would pose a risk to staff health, safety, and security and that section 18(1)(a) should be applied to the information to eliminate or control that risk. It was determined that the Applicant would construe comments made by staff on pages 11, 12, 19 and 117 as inflammatory, should not be disclosed, and should be excepted under section 18(1)(a) to protect the health and safety of the Alberta Crown Prosecution Services [ACPS] staff.
>
> When considering the application of section 18 it is important to take other legislation the Public Body is subject to into account including the review of the *Occupational Health and Safety Act,* Regulation, Codes and related policies. These documents requires the Public Body to ensure that employees are not subject to threats to their safety, mental or physical health and are briefly reviewed below.
>
> […]
>
> The early recognition of the potential for workplace violence and harassment is critical to the prevention of incidents. This includes the ability to recognize inappropriate behavior as a warning sign of potential hostility or violence that if left unchecked can escalate to higher levels.
> The Alberta Public Service has implemented measures to prevent exposure to and reduce the risk of workplace violence while employees carry out their responsibilities. This is outlined in the Employee Workplace Violence Prevention Guideline available on the above noted website.
>
> At no time are Public Body employees expected to tolerate aggressive or abusive behaviour, nor are they required to exhaust valuable resources to process complaints or matters known to lack substance or merit. As evidenced in this request the Applicant was refusing to accept decisions, particularly regarding a traffic court matter. The file also includes evidence of his complaints about Public Body staff (eg. pages 20-21]. It is therefore conceivable that if information in the records withheld under section 18(1)(a) [pages 11, 12, 19 and 117] were to be disclosed the Applicant may use it against the Public Body, its staff and other third parties.

[para 18] The Public Body argues that the Applicant is likely to consider the information in the records to be inflammatory if he were to receive the information it severed from the records under section 18. It asserts that the Applicant engages in nuisance behavior such as filing frivolous complaints and sending emails and making telephone calls.

[para 19] The incidents the records document relate to the Applicant's representation of individuals as an agent in Traffic Court and also to self-representation. There is nothing in the records that indicates there would be a threat of harm to employees of the Public Body if the Applicant were to view information in the records. Citizens are not bound to accept decisions of Crown prosecutors and government representatives and may pursue an aggressive legal strategy with which a Crown prosecutor or government representative does not agree. Inconvenience may result from the citizen's actions, but that does not mean the citizen is a threat to the safety of government employees or Crown prosecutors.

[para 20] The Public Body provided anecdotes regarding the Applicant's past behavior; however, it did not provide sufficient evidence regarding these encounters to assist me to determine whether the Applicant posed a threat on an objective basis. Moreover, these anecdotes did not allow me to find that disclosing the information in the records would be likely to result in probable harm to health or safety.

[para 21] I am unable to conclude that disclosure of the severed information is likely to result in harm to the health and safety of employees. I acknowledge that the Applicant used record 19 as evidence to support his complaint that was decided in Order F2019-35 that the Public Body had collected his personal information in contravention of the Act. However, I do not accept that a possibility, or even a likelihood, that an applicant will make a complaint under the FOIP Act or pursue an action in court is a harm contemplated by section 18.

Record 19

[para 22] The Public Body also applied other provisions to the records to which it applied section 18, with the exception of record 19. With respect to those other records, while I have found that section 18 does not apply, I have found that the other provision does. I am unable to identify an exception to disclosure that applies to record 19.

[para 23] Record 19 formed the basis of a complaint that was decided in Order F2019-35. The Applicant had argued that record 19 was evidence that the Public Body had improperly collected or used his personal information. On the evidence before me, I found that any information that could have been collected would have been about the Applicant acting as a representative, or agent, and not in his personal capacity. Therefore the Applicant's complaint was not about the collection or use of personal information under the FOIP Act. I dismissed the Applicant's complaint for that reason. As the Commissioner's decisions are final there is no ability for the Applicant to make another complaint regarding the same facts.

Conclusion

[para 24] I find that section 18 does not apply to the information to which the Public Body applied it.

ISSUE C: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to information in the records?

[para 25] Section 24(1) of the FOIP Act states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
> >
> > *(b) consultations or deliberations involving*
> > *(i) officers or employees of a public body,*
> > *(ii) a member of the Executive Council, or*
> > *(iii) the staff of a member of the Executive Council […]*

[…]

[para 26] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 27] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and (b), and agree these provisions apply to information generated when decision makers seek advice regarding a decision, or evaluate courses of action, or when employees propose courses of action or make recommendations..

[para 28] The Public Body argues:

> The Public Body relied upon section 24(1)(a) and 24(1)(b) of the Act to withhold some information on pages 11, 12, 16, 28 and 117. The Public Body further submits that section 18(1)(a) was used primarily in conjunction with sections (24)(1)(a)(b) to withhold information specific to pages 11, 12 and 117.
>
> Sections 24(1)(a) and 24(1)(b) were applied to withhold information in the email communications between lawyers of AB Crown Prosecution Services. The email contains advice, proposals, recommendations, analysis and consultation. The email participants are those who are in the position to take action and those who are in the position to offer relevant information and advice regarding what action is to be taken.
>
> The disclosure of the records in whole or in part, would mostly certainly make advice and deliberation within JSG's Crown Prosecution Services Branch less candid, comprehensive, and frank and would impair the Crown Prosecutor's ability to ensure excellent and independent decision making process. It is the Public Body's position that sections 24(1)(a) and 24(1)(b) were applied appropriately and that it properly exercised its discretion in the application of these sections. The Public Body exercised its discretion based on the fact that records are email chains requesting and giving advice to individuals charged with decision making for the Public Body. The release of this information will impact the internal flow of information by government employee or cause damage to the internal decision making process of the Public Body. Furthermore, if the information was made public, the authors of the records may approach

> future communications with apprehension to address an issue because of the fear of being wrong, "looking bad" or appearing foolish if their frank exchanges of ideas is made public.

I turn now to consider whether the Public Body properly applied provisions of section 24(1), and if so, whether it properly exercised its discretion when it withheld information from the Applicant under these provisions.

Record 12

[para 29] The Public Body severed a sentence from an email appearing on record 12.

[para 30] From my review of the severed information, I agree with the Public Body's characterization of it as deliberations of Crown prosecutors in the Crown Prosecution Services Branch. If taken out of context, the severed information could appear to be a statement, rather than advice as to a course of action. However, the paragraphs above and below it, which the Public Body provided to the Applicant, discuss and recommend a course of action. In the context of these paragraphs, the severed information may be viewed as a point of analysis intended to support adopting the strategy. While the Public Body could have applied section 24(1) to the entire email, the fact that it did not does not mean that the statement it did sever is not subject to section 24(1).

Record 16

[para 31] The Public Body severed most of the content of an email from record 16. I agree with the Public Body that the severed information contains consultations or deliberations of employees of the Public Body. The author of the email requested input regarding a proposed strategy from the recipients of the email. I find that section 24(1)(b) applies to the severed information.

Exercise of discretion

[para 32] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23 (CanLII), [2010] 1 SCR 815, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head

> must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 33] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 34] Applying the principles in *Ontario (Public Safety and Security),* a finding that section 24(1)(a) or (b) applies means that the public interest in ensuring that public bodies obtain candid advice *may* trump public or private interests in disclosing the information in question. After determining that section 24(1)(a) or (b) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 35] Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access […]*

[para 36] The Public Body argues that it exercised its discretion appropriately when it applied section 24(1). It states:

> The Public Body exercised its discretion based on the fact that records are email chains requesting and giving advice to individuals charged with decision making for the Public Body. The release of this information will impact the internal flow of information by government employee or cause damage to the internal decision making process of the Public Body. Furthermore, if the information was made public, the authors of the records may approach future communications with apprehension to address an issue because of the fear of being wrong, "looking bad" or appearing foolish if their frank exchanges of ideas is made public.

[para 37] I accept that the Public Body's stated reasons for withholding information from the Applicant under section 24(1) take into consideration the purpose of the provision. I would also accept that disclosing its plans and strategies might result in interference with its ability to implement them. I note, too, that the Public Body exercised its discretion in favor of disclosing information subject to section 24(1) in relation to record 12 and chose to withhold only information that could potentially result in interference with the proposed strategy, if disclosed. I find that the Public Body properly considered the purpose of section 24(1) when it severed information under this provision,

and that severing the information from the records served this purpose. I will therefore confirm the decision of the Public Body to sever the information to which it applied section 24(1).

ISSUE D: Did the Public Body properly apply section 27(1) of the Act (privileged information) to information in the records?

[para 38] The Public Body applied sections 27(1)(a) and (c) to withhold some information from the Applicant. Section 27 states, in part:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.*
>
> […]

Records 34 – 38

[para 39] The Public Body provided an affidavit of records in support of its claim of solicitor-client privilege. The Public Body's evidence establishes that records 34 – 38 contain emails between one of the Crown prosecutors named in the Applicant's access

request and the Public Body's lawyers. The Applicant requested "pager, cellphone and internal Government of Alberta messenger communications" relayed by this prosecutor. From the description I have been given, it appears that the information to which the Public Body applied section 27(1)(a) is not responsive to the Applicant's access request, as the Applicant did not request emails written or received by this Crown prosecutor or by any other Crown prosecutor not named in his request. The Public Body's evidence does not indicate that these emails were located in the email inbox of the Crown prosecutor whose emails the Applicant did request or whether he participated in these exchanges.

[para 40] For the purposes of the inquiry, I will assume that the records over which the Public Body is claiming solicitor-client privilege fall within the parameters of the Applicant's access request. The employee of the Public Body who provided the affidavit, states:

> I have reviewed the records (pages 34 to 38) and believe that they meet the criteria required to claim solicitor-client privilege.
>
> All the Records consist of either
>
> a) communications
>
> i. between a lawyer and the Public Body;
>
> ii. made in confidence; and
>
> iii. in the course of seeking or providing legal advice; or
>
> iv. communications made within the framework of the solicitor-client relationship that were intended to be confidential; or
>
> b) records reflecting internal discussion about legal advice that were intended to be confidential.
>
> All of the lawyers referenced in the Records are or were employed as barristers and solicitors and serve as lawyers for the Public Body.
>
> All of the lawyers referenced in the Records were acting in their capacity as legal advisors in relation to creation of the Records.
>
> The advice from the lawyers contained in the Records was given in the context of the solicitor-client relationship and is not business, policy or other non-legal advice.
>
> I believe that none of the Records have been made public.
>
> I believe that the Records have only been shared with those within the Government of Alberta who require the records in order to perform their employment responsibilities. I do verily believe that the Privileged Records were intended to be confidential and that distribution of the Privileged Records was limited to only those who needed to have the information.
>
> I do not believe that the solicitor-client privilege claimed over the Records has been waived by the Public Body.

[para 41] The affiant provided the following description of the records:

> Internal email between ACPS lawyers.
>
> The subject and context of the email relates to legal instructions /advice as well as the seeking of legal advice from ACPS employees to ACPS lawyers. The information is intended to be confidential between parties,

[para 42] The affiant also explained that a Crown prosecutor whose pager, cellphone and internal Government of Alberta messenger communications were the subject of the access request provided instructions to legal counsel and also sought legal advice in the severed communications. Those communications are documented in records 34 – 38.

[para 43] Solicitor-client privilege applies to confidential communications between a solicitor and a client in relation to the giving or seeking of legal advice. (*Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821).

[para 44] From my review of the records, other than records 34 – 38, I understand that legal issues had arisen that would require legal advice to address. I accept the affiant's statement that the communications between the Crown prosecutor and legal counsel were intended to be kept confidential and were kept confidential.

[para 45] I find that the evidence of the Public Body establishes that the communications on records 34 – 38 are likely subject to solicitor-client privilege and therefore subject to section 27(1)(a).

[para 46] As it is conceivable that the Public Body's legal position would be undermined if its communications with counsel were to be disclosed and as there is no obvious public interest that would be served by disclosing the information in the records, I find that the Public Body properly exercised its discretion by withholding records 34 – 38 from the Applicant.

Section 27(1)(c)

[para 47] The Public Body applied section 27(1)(c), reproduced above, to sever information from records 22, 23, 25, 82, 85, 91, 93, 113 and 114. It provided these records for my review.

[para 48] The Public Body argues:

> The Public Body relied on section 27(1)(c) to withhold in full pages 22 and 113-114 while pages 23, 25, 82, 85 93 were withheld in parts.
>
> The records withheld under this section include internal email with other ACPS staff that entail communications prepared in order to request or provide recommendations on legal matters before the courts.

[para 49] Section 27(1)(c) applies to information in correspondence between the Minister of Justice and Solicitor General, an agent or lawyer of the Minister of Justice and Solicitor General, or an agent or lawyer of a public body, and any other person in relation to a legal matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer. Section 27(1)(c) does not apply to *any* information appearing in correspondence between a lawyer and another person; rather, section 27(1)(c) applies to correspondence that is in relation to a matter involving the provision of advice or legal services by the lawyer.

[para 50] From my review of the records, I find that section 27(1)(c) applies to the information to which the Public Body applied this provision. The information is contained in correspondence and relates to matters involving the provision of prosecution services provided by the Crown prosecutors.

[para 51] The Public Body did not provide submissions regarding its exercise of discretion in relation to its application of section 27(1)(c). However, from my review of the records, and from its submissions as to why it believes section 27(1)(c) applies, I understand that it considered that disclosing the information to which it applied section 27(1)(c) could potentially result in interference with the decision making process of Crown prosecutors and their ability to discuss cases and obtain advice. I find that this is a purpose of section 27(1)(c) (and section 24(1)(b) which would also apply) and I find that the Public Body properly exercised its discretion under section 27(1)(c) when it withheld the information to which it applied this provision.

[para 52] For the reasons above, I will confirm the Public Body's decisions to withhold the information to which it applied sections 27(1)(a) and (c) from the Applicant.

ISSUE E: Did the Public Body meet its duty under section 10 of the Act (duty to assist applicants)?

[para 53] Section 10 of the FOIP Act states, in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 54] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order F2007-029, the Commissioner noted:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> • The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> • The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> • The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> • Who did the search

> • Why the Public Body believes no more responsive records exist than what has been found or produced

[para 55] In Order F2015-29, the Director of Adjudication reviewed past orders of this office and noted that the duty to assist has an informational component, in the sense that a public body is required to provide explanations of the search it conducts when it is unable to locate responsive records and there is a likelihood that responsive records exist. She said:

> Earlier orders of this office provide that a public body's description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included "why the Public Body believes no more responsive records exist than what has been found or produced" in the list of points that evidence as to the adequacy of a search should cover. This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

[para 56] In *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89 (CanLII), the Alberta Court of Queen's Bench confirmed that the duty to assist has an informational component. Manderscheid J. stated:

> The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission,* F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):
>
> In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and *why the Public Body believes that no more responsive records exist than what has been found or produced*. [Emphasis added in original]
>
> Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records*, its reasons for concluding that no more responsive records existed.* [My emphasis]

[para 57] From the foregoing cases, I conclude that the duty to assist requires a public body to search for responsive records. In addition, the duty to assist has an informational component, which requires the public body both to explain the search it conducted and to provide its reasons for believing that no additional responsive records are likely to exist.

[para 58] The Applicant requested the following information: "Communications that were relayed by [names of three Crown prosecutors] by way of pager, cell phone, and internal Government of Alberta messengers." The Applicant also indicated that he wanted to view "any and all correspondence' in the email inbox assigned to one of the Crown prosecutors he had named.

[para 59] The Applicant stated in his request for review:

> Please be advised that I believe the information that was blanked out / severed should never have been blanked out and severed and should have been made accessible to me, and I believe more information existed, and that the Public Body did not retrieve deleted emails about me as initially requested and look up government of Alberta internal instant messenger records about me or in any way connected to me and make such available to me. Other grounds and concerns exist and I reserve and preserve my rights.

[para 60] The Public Body stated in its submissions:

> The Applicant specifically mentioned three individuals as being the source of the records. Given that these individuals are Crown Prosecutors with the ACPS, on July 29, 2015, the FOIP Office emailed a request to identify and locate all responsive records to the FOIP Contact for the ACPS. The ACPS FOIP Contact obtained clarification from the FOIP Office that the requested records must relate to the FOIP Applicant and not just be all records about any number of cases and people.
>
> On July 31, 2015, the ACPS FOIP Contact emailed the three specific individuals involved and asked them to identify and locate responsive records. The three Crown Prosecutors conducted a search for responsive records in keeping with the scope of the FOIP request:
>
> > • All three Crown Prosecutors were responsible for conducting their own search including their Outlook email inboxes, sent items, and any electronic folders they may have, other electronic media, and paper records in the ACPS based on their record keeping systems and the records that were requested.
> >
> > • The three Crown Prosecutors were responsible for obtaining whatever technical support they needed to be able to retrieve all responsive records.
>
> On September 30, 2015, all three Crown Prosecutors notified the ACPS FOIP Contact that they only had emails, no other media or data including Lync, text, phone/cell phone data, pager or messenger records, that responded to the FOIP request.

[para 61] The Applicant has not adduced any evidence to support his stated belief that responsive pager, cell phone, and internal Government of Alberta messenger communications relayed by the three Crown prosecutors he named, exist.

[para 62] The Public Body has explained that it searched for the types of communications the Applicant requested. As it did not have responsive pager, cell phone, or internal Government of Alberta messenger communications relayed by any of the three Crown prosecutors, it decided to provide the Applicant with emails sent to and from the three Crown prosecutors the Applicant had named. It did not ask the Applicant whether he wanted emails created by, or sent to, the two Crown prosecutors whose inbox contents the Applicant did not request. I note that wording of the Applicant's access request is clear and precise. As the access request is clear, there was no need for the Public Body to provide anything other than pager, cell phone, or internal messenger communications for two of the Crown prosecutors whose communications were the subject of the access request.

[para 63] In this case, the issue the Applicant raised regarding the Public Body's response was that it did not provide the records he had requested, not that it provided records that he did not request. As discussed above, there is no reason to believe that the Public Body has responsive pager, cell phone, or internal messenger communications in its custody or control that it has not provided. I find that the Public Body has established that it conducted a search sufficient to meet the duty to assist.

IV. ORDER

[para 64] I make this order under section 72 of the Act.

[para 65] I confirm that the Public Body met its duty to assist by conducting an adequate search for responsive records.

[para 66] I order the Public Body to give the Applicant access to the information it severed from record 19.

[para 67] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

_____
Teresa Cunningham
Adjudicator
/kh